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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. [redacted] 41

HARRY B. GREENE AND GLENN I. TONEY,
Petitioners,

VS.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF

ROBERT M. DRYSDALE,
Attorney for Petitioners.
1538 Dime Building
Detroit 26, Michigan

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 712

HARRY B. GREENE AND GLENN I. TONEY,
Petitioners,

VS.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF

Now come the above named plaintiffs, by Robert M. Drysdale, their attorney, and pray that a writ of certiorari issue to review the judgments entered by the United States Court of Claims in the above entitled cases.

Opinion Below

The opinion of the United States Court of Claims (R. 13) is not yet officially reported.

Jurisdiction

The judgments of the Court of Claims were entered on January 9, 1951. (R. 18) A motion for a new trial was seasonably made and overruled on March 6, 1951. (R. 18) The jurisdiction of this court is invoked under the pro-

visions of Sec. 1 of Act of June 25, 1948, c. 546, (62 Stat. 928); 28 U.S.C., Sec. 1255, (1), providing for certiorari from the Supreme Court to the Court of Claims.

Statutes Involved

The statute involved is the Overtime Sunday and Holiday Pay Act of the immigration service, being Act of March 2, 1931, (46 Stat. 1467); 8 U.S.C. 109a, 109b, and which for brevity will be referred to hereafter as the Immigration Act. Also involved is the Overtime Sunday and Holiday Pay Act of customs inspectors, from which the Immigration Act is copied, and being Sec. 5 of Act of February 13, 1911, (36 Stat. 901) as amended by Act of February 7, 1920, c. 61, (41 Stat. 402), 19 U.S.C. 267, and which is adopted by reference in the administrative provisions of the 1922 and 1930 tariff acts, respectively, and the relevant administrative provisions of Tariff Act of 1930, being Sections 401, (46 Stat. 708, 19 U.S.C. 1401), App. 16, and 451, (46 Stat. 715, 19 U.S.C. 1451), and which acts will be hereafter referred to as the Customs Act. Relevant portions of these statutes, as they existed when the Immigration Act was enacted, appear in the appendix. (p. 16)

Question Presented

Whether under the Immigrationn Act inspectors of the border patrol of the immigration service are entitled to extra pay for being required to work on Sundays and holidays to patrol highways, roads, trails, rivers, bridges, ferries, wharves, railroads and shipyards, along the Canadian and Mexican border, and parts of the seacoast, where no regular immigration service is maintained, in order to enforce the immigration laws of the United States by examining such conveyances and the occupants thereof, for the purpose of apprehending any aliens attempting to enter

the United States in the patrol area, and taking any such alien to the nearest port of entry to be further examined by immigration inspectors.

Plaintiffs are not seeking overtime pay in these suits, and the matter of such pay need not be considered.

Statement

The administration of the immigration laws is, by statute, vested in the Commissioner of Immigration with broad general powers to control, direct and supervise all employees of the service, and to prescribe regulations therefor. (Act February 5, 1917, c. 29, s. 23; 39 Stat. 892; 8 U.S.C. 102)

By statute, all aliens entering the United States must be examined by immigration inspectors. (Act of February 5, 1917, c. 29, s. 16; 39 Stat. 885; 8 U.S.C. 152), and, by regulation, must enter at ports designated by the Commissioner of Immigration for that purpose. (8 Code Fed. Reg. s. 175.42)

In the enforcement of the immigration laws, all persons entering the United States from foreign places are required to be examined in order that aliens be made to comply with the law and report at such ports of entry and there be examined by immigration inspectors. (Findings 3 and 4, R. 8, 9)

In the administration of the immigration laws, persons entering at ports of entry are examined by immigration inspectors (Finding 3, R. 8, 9), and persons entering between ports of entry, (patrol area) are examined by inspectors of the border patrol. (Findings 3, 4 and 5, R. 8, 9)

The border patrol as presently organized was created by Appropriation Act of May 28, 1924, (43 Stat. 240) wherein one million dollars was appropriated for a land

border patrol for the purpose of enforcing the immigration laws. By regulation issued March 10, 1937, (8 C.F.R. 60.27), all inspectors of the border patrol have been vested without further designation with all powers of immigration inspectors. (Finding 7, R. 11)

Duties and Powers of Patrol Inspectors

As shown by literature issued by the Bureau of Immigration, (Finding 6, R. 10-11), it is the duty of the patrol inspectors to patrol and guard highways, roads, trails, rivers, bridges, ferries, wharves, railroads, and shipyards, along the Canadian and Mexican border, and parts of the seacoast, where no regular immigration service is maintained, and to stop and inspect boats, automobiles and other conveyances arriving in the United States at such places in which there is reason to believe aliens may be attempting to enter illegally and to examine the occupants of such conveyances as to their right to enter the United States.

An alien is in the act of entering the United States until he arrives at his intended destination within the United States, (*Lew Moy* v. *United States,* 237 Fed. 50).

If an alien is encountered attempting to make entry in the patrol area he is taken into custody by the patrol officer and taken to a port of entry to be there further examined and processed by immigration inspectors. (Finding 5, R. 9) Citizens of the United States are "landed", that is, allowed to enter. (Finding 5, R. 9)

Patrol inspectors possess all of the power which a regular inspector would have while working in the patrol area. An alien could not be admitted in the patrol area by either because of the requirement that aliens must report at ports designated by the Commissioner.

Both plaintiffs have performed services as a patrol inspector on Sundays and holidays within the period of six

years prior to the time of filing their respective suits, and they have not received any extra pay under the provisions of the Act of March 21, 1931, for the services they performed as patrol inspectors on such days. (Finding 11, R. 12)

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that the services to be compensated by the extra pay provisions of Act of March 2, 1931, must be performed at ports of entry.
2. In holding that the work of border patrol inspectors of the immigration service is not performed "in connection with" the examination and landing of persons entering the United States at ports of entry under the provisions of Act of March 2, 1931.
3. In holding that patrol inspectors, in performance of their duties, do not examine and land passengers and crews of vessels, conveyances and vehicles, entering the United States from foreign ports, as defined in Act of March 2, 1931.
4. In holding that patrol inspectors, in performance of their duties, do not perform services "in connection with" the examination and landing of passengers and crews of vessels, conveyances and vehicles, arriving in the United States from foreign ports, as defined in Act of March 2, 1931.
5. In holding that plaintiffs, in performance of their duties as patrol inspectors, are not entitled to the extra pay provisions of Act of March 2, 1931.
6. In dismissing plaintiffs' petitions.

Reasons for Granting Certiorari

These are test cases brought by a group of patrol inspectors of the immigration service. The decision of the Court of Claims deprives such patrol inspectors of their right to extra pay for Sunday and holiday work. If the decision is

not reviewed, they will be the only group of federal employees required to work regularly on Sundays and holidays, without extra pay. Plaintiffs are informed there are about 1500 such inspectors continually in service.

The decision probably will control similar claims of patrol inspectors of the customs service. Thirty-five cases of customs patrol inspectors are pending in the Court of Claims. The patrol of the customs service has been abandoned.

Plaintiffs claim the decision of the Court of Claims replaces the plain, literal language of the statute with restrictions not contained therein.

BRIEF

Except in one important item, hereinafter mentioned, (p. 10, *infra*), the Immigration Act was copied from the prior Customs Act, with the necessary changes in wording to conform the Immigration Act to the Customs Act. Much of the verbiage of the Customs Act was retained; therefore, the legislative history of the Customs Act is important.

Short Legislative History of Customs Statute

Section 50 of Act of March 2, 1799, (1 Stat. 665) creating a customs service, prohibited the assignment of customs inspectors to duty on Sundays and the Fourth of July, or from sunset to sunrise, for services in connection with the unlading of "vessels". The matter of extra compensation for services performed on those days was left to negotiations between the master of the vessel and the inspectors.

By Act of March 3, 1873, (17 Stat. 579, R.S. 2871) government provided for a uniform and reasonable rate of extra pay for night services in connection with "steamships". The act did not affect Sunday or holiday work.

By Act of June 30, 1906, (34 Stat. 633) the Act of March

3, 1873, *supra,* was amended by extending its provisions to "vessels and other conveyances", presumably, for the purpose of allowing lading and unlading of railway cars at night.

By Section 5 of Act of February 13, 1911, (36 Stat. 899, 901) the Secretary of the Treasury was required to fix a reasonable rate of extra pay for Sunday and holiday services, with the inference that the inspectors could be assigned to duty on these days. The rate was fixed by the Secretary of the Treasury at two days' extra pay, and which rate has never been changed.

By Act of February 7, 1920, (41 Stat. 402), Section 5, Act of February 13, 1911, *supra,* was amended, and the rate of two days' extra pay was made statutory, and the compensable services broadened to include the examination of passengers and their baggage.

This led to the decision of this court in the case of *International Railway Co.* v. *Davidson,* 257 U.S. 506, 42 S. Ct. 159, 66 L. Ed. 341, involving inspectional services at the International Bridge at Niagara Falls, wherein this court pointed out that the extra pay provisions of Section 5 of the Act of 1911, referred to the examination of the vessels and conveyances described in the first four sections of the Act, and which were vessels or conveyances required to make entry and report at ports of entry, and that the International Bridge carrying street cars and foot traffic could not be construed as such a vessel or conveyance.

When the *Davidson* decision was handed down, Congress had under consideration the 1922 Tariff Act, (19 U.S.C., s. 1401 to 1465). In that act it immediately revised the administrative provisions of the customs laws, among other particulars, by broadening the services for which extra compensation was to be paid to include the examination of persons arriving in the United States by "vessels and

vehicles", and defining those words to include every description of carriage or other contrivance used or capable of being used as a means of transportation on land or in water. (See description of "vessel and vehicle".) (App. 18).

The Act of March 2, 1799, (*supra*), remained in effect until superseded by the repealing provision of the 1922 Tariff Act. (Act September 1, 1922, c. 356, s. 644; 42 Stat. 990).

Erroneous Construction by Government and Resulting Litigation

The amended act was construed erroneously by the Secretary of the Treasury and followed by similar erroneous construction by the Bureau of Immigration, in that at ports along the Canadian and Mexican border, and the Great Lakes, where the inspection service was performed under the platoon system of staggered shifts, customs inspectors and, later, immigration inspectors, were assigned to duty on Sundays and holidays within their regular work-week, without extra pay, while at seaports the inspection on those days was performed on assignments to duty in addition to the regular work-week. The result was that at seaports the inspectors received the extra pay, but at other ports they did not receive it.

To protect their rights, the inspectors were obliged to and did unite and bring suit, resulting in the following cases:

United States v. *Myers,* (customs) 320 U.S. 561, 88 L. Ed. 312, 64 S.Ct. 337, involving inspectional services at international highways, railways, bridges and ferries.

Renner v. *United States,* (immigration) 106 C.Cls., 676, involving the same facilities as in the *Myers* case, (*supra*).

O'Rourke v. *United States,* (customs) 109 C.Cls. 33,

involving vehicular traffic over highways at land border ports.

Taylor v. *United States,* (immigration) 114 C.Cls. 59, involving foot traffic only at land border port of San Ysidro, California.

These cases clearly established the right of the inspectors to extra pay for such inspectional services on Sundays and holidays, regardless of the means of transportation used by the persons examined in arriving at the borders of the United States.

The difference between those cases and the cases at bar is that in those cases the inspection work was performed at ports of entry, while in these cases the inspection work is performed in the patrol area between ports of entry, but is performed "in connection with" the inspection work at ports of entry.

By substituting the definition given in the Customs Act of "vessel" and "vehicle" (App. 18) for the words "vehicle" and "other conveyance" and "vessel", as used in Sections 1 and 2 of the Immigration Act, the Immigration Act then in plain, easily understood language, grants the extra pay here involved to

> inspectors and employees who may be required to perform duties in connection with the examination and landing of persons arriving in the United States by any description of carriage or other contrivance used or capable of being used as a means of transportation on land or water.

More general language cannot be found to describe the examination work to be compensated under the act. Certainly, this description covers the "boats, automobiles, and other conveyances", the occupants of which the patrol inspectors are required to inspect on "highways, bridges, trails and rivers", along the Mexican or Canadian border, and certain parts of the seacoast.

Broad Scope of the Act

We point out:

1. There is no restriction whatever in the immigration statute limiting the compensable services to those performed at ports of entry or any other place.

2. The extra pay is granted not only to "inspectors" but also to "employees" of the Immigration and Naturalization Service.

3. The persons to be examined are not "aliens", but are persons arriving in the United States. The word "alien" is not mentioned in the statute. In fact, most of the persons examined and landed are citizens of the United States.

4. The extra pay is not limited to the examination of such persons, but is granted for services "in connection with" such examination.

5. The conveyances to be examined are not limited to those arriving legally. In fact, much of the work of the immigration service is directed towards illegal activity.

6. The extra pay is not conditioned upon the power of government to secure reimbursement. Much of the work is expressly exempted from the burden of the extra pay.

It cannot be claimed that the provision in Section 2 of the Act providing for reimbursement to government by the master or consignee of the vessels to be examined indicates that the compensable services should be limited to those performed at ports of entry, where such vessels arrive.

The essential difference between the Immigration Act here involved and the Customs Act, from which it was drafted, is that the last sentence of Section 2 of the Immigration Act expressly exempts from the burden of such payment inspectional services of persons

> "arriving by international ferries, bridges or tunnels, or by aircraft, railroad trains, or vessels on the Great

> Lakes or connecting waterways, when operating on regular schedules."

After the decision of this court in the *Myers* case, *supra*, Congress, by Act of June 3, 1944, (c. 233, s. 1, 58 Stat. 269, 19 U.S.C. 1451) amending the administrative provisions of the Customs Act, made similar exemption provisions in the Customs Act and exempted the same facilities from the burden of the extra pay, and extended the exemption to

> "persons arriving in or departing from the United States by motor vehicle, * * * on foot, or by other means of travel upon * * * any highway, * * * ".

The facilities so exempted in both the Immigration and Customs Acts are those where the inspection work is performed under the platoon system in staggered shifts for the benefit of the government, rather than for the benefit of the master or consignee of any vessel.

Yet, both the Immigration and Customs Acts grant extra pay for inspectional services at such facilities.[1] This should be conclusive of the proposition that it was not the intention of Congress to limit the extra pay to work at those places or facilities where the assignments to duty were for the benefit of carriers, and from which reimbursement to government could be secured.

The word "port" as used in the proviso at the end of the first section of this statute is of no significance in restricting the extra pay for services performed at a port of entry. The reason for the proviso is set forth clearly in Congressional Record.[2] It was introduced on the floor of the House by Mr. Treadway of Louisiana as an amendment to the Customs Act at the time of its passage, with the purpose

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[1] This was determined in the *Myers, Renner, O'Rourke* and *Taylor* cases, *supra*.

[2] Vol. 59, Part 2, January 28, 1920; proceedings in the House of Representatives of the 66th Congress, (2nd session).

clearly expressed of conforming the working hours at the port of New Orleans to the hours of the longshoremen's union at that port, being from 7:30 A.M. to 4:30 P.M.

The Words "In Connection With" Cover Services Performed by Patrol Inspectors

But if it is held that the services of patrol inspectors do not fall within the *actual* examination contemplated by the statute, nevertheless, they are entitled to the extra pay because their services are directly "in connection with" the inspection work of immigration inspectors performed at ports of entry. Both are for the purpose of requiring all persons entering the United States to be examined so as to prevent the illegal entry of aliens. The examination at the ports of entry would be futile if the patrol areas were left unguarded because aliens could then enter uninspected in those areas.

The work of the patrol inspectors supplements and makes effective the work of the inspectors at ports of entry. The patrol inspector works in connection with and between ports of entry, and actually delivers to immigration inspectors at such ports all aliens apprehended, to be there further examined by immigration inspectors. Therefore, the work of the patrol inspector is performed "in connection with" the work performed by immigration inspectors at ports of entry.[3]

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[3] The principle of the following cases bring the services of patrol inspectors clearly within the services performed "in connection with" those performed by immigration inspectors at ports of entry.

Gurney, et al. v. *At. G. W. Ry. Co. et al.*, 58 N. Y. 358, 371.

J. Ray Arnold Corp. v. *Richardson*, 105 Fla. 204; 141 So. 133.

United States v. *American Union Transport*, 327 U. S. 437; 66 S. Ct. 644; 90 L. Ed. 772.

Wallrabenstein, et al. v. *Industrial Commission of Wisconsin*, 195 Wis. 15; 216 N. W. 495.

Danciger, et al. v. *Cooley* (Kans.), 248 U. S. 319; 39 S. Ct. 119; 63 L. Ed. 266.

The J. Ray Arnold case, supra, is especially applicable.

Applicable Principles of Statutory Construction

50 Amer. Juris., Sec. 241, p. 236.

"*Limitations.* There is a prima facie preference in favor of the literal meaning of the words of the statute, and the general rule requires an adherence to the letter thereof. The language of a statute is to be construed literally, where there is no reason why it should not be so interpreted. Accordingly, any construction which contradicts the letter of a statute should be carefully scrutinized, and applied with caution and circumspection, lest the judgment of the court be substituted for that of the legislature."

50 Amer. Juris., Sec. 230, p. 217, and cases cited.

"In the construction of a statute, the general rule is that the court may write no limitations therein. • • • General words are to have a general operation where the manifest intention of the legislature affords no ground for qualifying or restraining them. Under this rule, where the statute is expressed in general language, it is to be applied to all cases coming within its terms • • •."

Sutherland Stat. Const., 3rd Vol. 2, p. 509, s. 5102.

"Standards established by the medium of legislation are usually intended to have considerable breadth with the result that a statute may cover many situations that do not immediately occur to the mind."

Barr v. *United States*, 324, U.S. 83, 90; 89 L. Ed. 765; 65 S. Ct. 522, 525.

"If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 257; *Browder* v. *United States*, 312 U.S. 335, 339, and cases cited."

50 Amer. Juris., Sec. 372, p. 380-81, and cases cited.

> "Indeed, nothing but clear and unmistakable language will warrant a court in a construction which will produce the unequal operation of a statute. Hence, unless it can be clearly shown that there is some statutory provision requiring a distinction to be made between the rights of one class of persons or entities and those of another, the courts will, if possible, give such construction to the statute as will place both on an equal footing."

In construing these statutes it seems that great weight should be given to the steadfast policy of Congress, from the year 1799 to the present day, in protecting the Sundays and holidays of customs inspectors, who work side by side with immigration inspectors. As work on those days became needed in our expanding economy, the scope of the services to be compensated was broadened until it finally included the examination of persons arriving in the United States from foreign places by any description of carriage or other contrivance used or capable of being used as a means of transportation on land or water.

Conclusion

We submit that:

1. The inspection work of the patrol inspector falls clearly within the general language of the statute.
2. In any event, it must be conceded that the work of the patrol inspector is performed "in connection with" the examination work of immigration inspectors at ports of entry.

Patrol inspectors and immigration inspectors work the same hours and perform similar duties requiring similar training, and receive substantially the same compensation, and they work "in connection with" each other. There is no equity or justice whatever in denying extra compensation to one group, while paying it to the other.

Every reason assigned by the Court of Claims for its construction of the statute necessitates reading into the statute limitations not contained therein. The statute is clear and unambiguous, and is not susceptible of "construction", when such construction creates inequities, injustice and discrimination.

We respectfully submit that certiorari should be granted in these cases.

Respectfully submitted,

ROBERT M. DRYSDALE,
Attorney for Plaintiffs.

Business Address:
1538 Dime Building,
Detroit 26, Michigan.

DATED: May 1951.

APPENDIX

Immigration Act. Act of March 2, 1931, 46 Stat. 1467, (8 U.S.C. 109a, 109b).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Attorney General shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Attorney General is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed.

Sec. 2. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving in the United States from a foreign port to the Attorney General, who shall pay the same to the several immigration officers and employees entitled thereto as provided in this Act. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and

have so reported, whether the actual inspection or examination of passengers or crew takes place or not: *Provided,* That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules.

Customs Act. Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920, Stat. 402 (19 U.S.C. 267.)

Sec. 5: That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unloading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according

to the rates fixed therefor by the Secretary of the Treasury: *Provided,* That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further,* That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

Sections 401, 450 and 451 of the Tariff Act of 1930, c. 497, Title IV, 46 Stat. 708, 715, (19 U.S.C. 1401, 1450, 1451) provide in part as follows:

Sec. 401. MISCELLANEOUS.

When used in this title or in Part I of Title III—

(a) *Vessel.* The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

(b) *Vehicle.* The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

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